

1 failure to follow laws and regulations" and that they created "a hostile work place for the
2 purposes of her exercise of her rights to free speech when she voiced this concern." (*Id.* at
3 5-6). In the third claim for relief, Plaintiff alleged a denial of due process because she had "a
4 state-created property interest in [her] job." (*Id.* at 6). Defendants "willfully engaged in joint
5 activity and invoked state action, all under color of law" to deny her procedural due process
6 in violation of the Fourteenth Amendment. (*Id.*). In the fifth claim for relief, Plaintiff alleged
7 intentional infliction of emotional distress, a state tort claim. (*Id.* at 7). Defendants "engaged
8 in the aforementioned discriminatory and work place conduct against [Plaintiff] and therefore
9 intentionally inflicted severe emotional distress upon her as a victim." (*Id.*). Defendants
10 conduct was "intentional, reckless, extreme and outrageous, and resulted in severe emotional
11 distress . . . resulting in physical symptoms including severe problems related to stress." (*Id.*).
12 Plaintiff sought monetary damages. (*Id.* at 6-8).

13 This Court dismissed, without prejudice, the State of Nevada because Plaintiff failed
14 to timely serve the State. (Order (#28) at 4). Martin is the only remaining defendant.

15 On December 7, 2010, Defendant filed a Motion for Summary Judgment (#25). Plaintiff
16 did not file a timely response and did not request an extension. (See *generally* Docket Sheet).
17 On January 4, 2011, Defendant filed a Motion to Grant Defendant's Motion for Summary
18 Judgment (#30) based on Local Rule 7-2(d) because Plaintiff had failed to respond. On
19 February 1, 2011, Plaintiff filed an Opposition to Defendant's Motion for Summary Judgment
20 (#35). Plaintiff did not address why her response was over a month late and did not respond
21 to Defendant's motion to grant summary judgment. (See *generally* Opp'n to Mot. for Summ.
22 J. (#35)).

LEGAL STANDARD

24 In reviewing a motion for summary judgment, the court construes the evidence in the
25 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
26 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment “if the movant shows
27 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
28 as a matter of law.” Fed.R.Civ.P. 56(a). Material facts are “facts that might affect the outcome

of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment “by relying solely on conclusory allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

With respect to First Amendment retaliation, Defendant argues that Plaintiff has failed to plead any facts in support of claim because the complaint fails to identify constitutionally protected speech and Plaintiff’s “punishment” for engaging in such speech. (Mot. for Summ. J. (#25) at 5-6). Defendant asserts that there are no facts in the complaint that indicate the

1 working environment was hostile or that an adverse employment action had been taken
 2 against Plaintiff. (*Id.* at 6). Defendant also asserts that the First Amendment retaliation claim
 3 against Martin in her official capacity must be dismissed based on Eleventh Amendment
 4 immunity. (*Id.* at 7). Defendant contends that she is entitled to qualified immunity because
 5 there is no showing that any of her actions violated Plaintiff's constitutional rights. (*Id.*).
 6 Defendant asserts that she is entitled to state law discretionary-act immunity pursuant to NRS
 7 § 41.032(2). (*Id.* at 8). With respect to the due process claim, Defendant argues that Plaintiff
 8 fails to allege any facts that demonstrate that she has a property interest in her position and
 9 that it had been compromised. (*Id.* at 9). Additionally, Defendant asserts that res judicata
 10 applies to this claim based upon a Nevada State Personnel Commission Hearing Officer's
 11 decision. (*Id.*). Defendant argues that because Plaintiff did not appeal the administrative
 12 decision to the state district court she cannot attempt to relitigate the issue now. (*Id.* at 10).
 13 Defendant asserts that the due process claim her in her official capacity must be dismissed
 14 based on Eleventh Amendment immunity. (*Id.*). Defendant asserts that she is entitled to
 15 qualified immunity and state law discretionary-act immunity. (*Id.* at 11-12). With respect to
 16 the IIED claim, Defendant argues that Plaintiff's complaint is "void of any factual reference to
 17 improper behavior committed by Defendant and does not contain a clue as to what severe
 18 problems or symptoms Plaintiff suffered." (*Id.* at 13).

19 In support of her motion for summary judgment, Defendant attaches the following: (1)
 20 Defendant's affidavit; (2) an Employer's Report of Industrial Injury or Occupational Disease;
 21 (3) an Order of Dismissal from the Nevada State Personnel Commission Hearing Officer; (4)
 22 Plaintiff's Nevada Equal Rights Commission ("NERC") filing for race and disability
 23 discrimination dated March 28, 2008; (5) a notice of electronic filing; (6) class specifications
 24 for Computer Systems Technician IV before 8/11/06; and (7) class specifications for IT
 25 Technician IV effective 8/11/06. (See Mot. for Summ. J. (#25) at 17-67).

26 Defendant's affidavit stated that she had been the Chief of Information Services for
 27 NDOT since February 2003 and that she had supervised Plaintiff. (Ex. 1 (#25) at 18).
 28 Defendant had temporarily assigned Plaintiff to "conduct technical research for agreements,"

1 an assignment within Plaintiff's class specifications. (*Id.*). After Plaintiff completed the
2 research assignment, Defendant returned Plaintiff to the programming section of Information
3 Services. (*Id.*). Defendant had reassigned Plaintiff from time to time based on the needs of
4 the department and had reassigned Plaintiff to various duties all within Plaintiff's class
5 specifications. (*Id.*). On March 8, 2008, Defendant reassigned Plaintiff to the NDOT help desk
6 following "notification from the Department of Personnel that newly revised class specifications
7 indicated that the current employee working the help desk was working outside his
8 classification." (*Id.*). After the class specification had been rewritten, the only duties within
9 Plaintiff's classification that she could perform were at the help desk. (*Id.*). The duties in the
10 programming section had been eliminated from the class specification. (*Id.*). There were only
11 two employees who were properly classified to work the help desk and both employees,
12 including Plaintiff, were required to perform that task. (*Id.* at 19).

13 Pursuant to the order of dismissal, dated June 30, 2008, the issues before the State
14 Personnel Commission Hearing Officer were whether Plaintiff was involuntarily transferred and
15 if so, was such involuntary transfer done to harass Plaintiff. (Ex. 3 (#25) at 25-26). Because
16 Plaintiff's position control number and job responsibilities did not change after her transfer from
17 the Landmark Building in Carson City to the NDOT headquarters in Carson City, the hearing
18 officer granted the State's motion to dismiss. (*Id.* at 26-28).

19 The class specifications prior to August 11, 2006, provided that a Computer Systems
20 Technician IV had a pay grade of 31. (Ex. 6 (#25) at 42, 55). The class specifications after
21 August 11, 2006, stated that an IT Technician IV had a pay grade of 31. (Ex. 7 (#25) at 57,
22 67).

23 In response, Plaintiff argues that summary judgment is improper at this time because
24 there has been no discovery. (Opp'n to Mot. for Summ. J. (#35) at 6). With respect to her
25 First Amendment retaliation claim, Plaintiff argues that "[e]xercising her right to medical care
26 [based on] job related injuries and speech regarding unfair-unequal treatment constitutes a
27 matter of public concern." (*Id.* at 8). She asserts that when she sought medical help she was
28 transferred. (*Id.*). Plaintiff asserts that "[a]s to objective confirmation of emotional distress,

[she] will supply during the discovery process." (*Id.* at 9). Plaintiff asserts that state discretionary-act immunity does not apply because Defendant's actions did not display any sound policy objectives. (*Id.*). Plaintiff asserts that "through discovery [she] will show that Martin [had] a history and policy of harassing [Plaintiff] stretching over a long period." (*Id.* at 10). With respect to the due process claim, Plaintiff asserts that Defendant's argument is improper because there "has been no discovery conducted and the facts regarding the harassment will come to light during that process." (*Id.* at 11).

In support of her opposition to summary judgment, Plaintiff attached her own affidavit. (Hunt Aff. (#35-1) at 1). Plaintiff asserted the following. In 1998, she transferred to NDOT Information Technology as a Computer System Technician III and was stationed at the headquarters building in Carson City. (*Id.*). In August 2004, Defendant transferred Plaintiff to the Landmark Building in the web development section. (*Id.*). Plaintiff complained about the transfer. (*Id.*).

In July 2005, Plaintiff drafted a request to upgrade her position to IT Professional Trainee, but Defendant denied her request. (*Id.* at 2). On January 9, 2007, Plaintiff visited her primary care physician because of issues with her wrists. (*Id.*). Her physician recommended that she see a doctor through her employer because there were "indications of carpal tunnel syndrome." (*Id.*). Plaintiff contacted Diane Kelly in Human Resources and requested the appropriate forms. (*Id.*). Two days later Plaintiff was transferred back to headquarters against her wishes. (*Id.*). Her manager told her she was being moved back to headquarters to assist in a special project, but there was "no project" and she was given "odd and meaningless tasks." (*Id.*). In February 2007, Plaintiff received authorization to seek medical help for her ongoing wrist issues, but chose to work with the pain for fear of retaliation. (*Id.*). On May 1, 2007, she was transferred back to the Landmark Building and was told that she would be trained as a programmer and web developer. (*Id.*). In January 2008, she sought help for her carpal tunnel. (*Id.*). Immediately thereafter she was told she was being moved back to headquarters and would return to the help desk. (*Id.*). On March 28, 2008, she filed a complaint with the Nevada Equal Rights Commission charging harassment based on her

1 Native American ethnicity, disability, and age. (*Id.* at 3).

2 In reply, Defendant requests that the Court strike Plaintiff's opposition because it was
 3 filed late and did not address why it was late. (Reply to Mot. (#37) at 2). Defendant argues
 4 that before discovery can be an issue, Plaintiff must state a plausible cause of action. (*Id.* at
 5 3-4). Defendant asserts that Plaintiff's opposition is devoid of any material facts to support her
 6 causes of action. (*Id.* at 4). Defendant reiterates that Plaintiff has not identified what her
 7 constitutionally protected speech was or what her treatment was. (*Id.* at 6). Defendant argues
 8 that Plaintiff has failed to "assert even minimal facts to establish a basis for allegations
 9 concerning a violation of any constitutional right" and that she may not rely on discovery to
 10 flesh out a cause of action. (*Id.* at 8). Additionally, Defendant notes that Plaintiff did not
 11 respond to her res judicata argument. (*Id.* at 9). Defendant asserts that the Court may decline
 12 to exercise supplemental jurisdiction over Plaintiff's state law claim after dismissing the federal
 13 claims and notes that Plaintiff did not address IIED in her opposition. (*Id.* at 9-10).

14 As an initial matter, Plaintiff is prohibited from suing Defendant in her official capacity
 15 under 42 U.S.C. § 1983 because neither a State nor its officials acting in their official
 16 capacities are persons under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71,
 17 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). The Supreme Court has held that because an
 18 official-capacity suit against a state officer is really a suit against the official's office, the suit
 19 is no different from a suit against the State itself. *Id.* Therefore, the Court dismisses the
 20 second and third causes of action against Defendant in her official capacity.

21 **A. Claim Two: First Amendment Retaliation¹**

22 A First Amendment retaliation claim against a government employee involves
 23 a sequential five-step series of questions: (1) whether the plaintiff spoke on a
 24 matter of public concern; (2) whether the plaintiff spoke as a private citizen or

25 ¹ In this case, Defendant filed a Motion to Grant Defendant's Motion for Summary
 26 Judgment (#30) based on Plaintiff's failure to file a timely response pursuant to Local Rule
 27 7-2(d). The Court denies this motion as moot and proceeds to the merits of the motion for
 28 summary judgment because the Ninth Circuit has held that "a nonmoving party's failure to
 comply with local rules does not excuse the moving party's affirmative duty under Rule 56 to
 demonstrate its entitlement to judgment as a matter of law." *Martinez v. Stanford*, 323 F.3d
 1178, 1182 (9th Cir. 2003).

1 public employee; (3) whether the plaintiff's protected speech was a substantial
 2 or motivating factor in the adverse employment action; (4) whether the state had
 3 an adequate justification for treating the employee differently from other
 4 members of the general public; and (5) whether the state would have taken the
 5 adverse employment action even absent the protected speech.

6 *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The plaintiff bears the burden of showing
 7 that the speech addressed an issue of public concern. *Id.* The Ninth Circuit has defined the
 8 scope of the public concern element broadly and has adopted a liberal construction of what
 9 an issue of public concern is under the First Amendment. *Desrochers v. City of San
 10 Bernardino*, 572 F.3d 703, 710 (9th Cir. 2009). However, the Ninth Circuit has defined limits.
 11 *Id.*

12 To address a matter of public concern, the content of the speech "must involve 'issues
 13 about which information is needed or appropriate to enable the members of society to make
 14 informed decisions about the operation of their government.'" *Id.* Speech that deals with
 15 individual personnel disputes and grievances that would be of no relevance to the public's
 16 evaluation of the performance of governmental agencies is generally not of public concern.
 17 *Id.* Speech that relates to internal power struggles within the work place and speech which
 18 is of no interest beyond the employee's bureaucratic niche is generally not of public concern.
 19 *Id.* The court looks to what the employees actually said and not what they say after the fact.
 20 *Id.* at 711. Speech that seeks to bring to light allegations of "actual or potential wrongdoing
 21 or breach of public trust" would more likely amount to speech of public concern. *Connick v.
 22 Myers*, 461 U.S. 138, 148, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983). The court must
 23 focus on "whether the public or community is likely to be *truly interested* in the particular
 24 expression, or whether it is more properly viewed as essentially a private grievance."
 25 *Desrochers*, 572 F.3d at 713.

26 In this case, it is unclear what "speech" Plaintiff is claiming she made. In her complaint
 27 she states that Defendants were "punishing [her] for reporting their failure to follow laws and
 28 regulations" and that they created "a hostile work place for the purposes of her exercise of her
 29 rights to free speech when she voiced this concern." (See Compl. (#1-2) at 5-6). Plaintiff does
 30 not provide any more specifics. In viewing the evidence in the light most favorable to Plaintiff,

1 her speech may have been filing a NERC charge of discrimination for race and disability in
 2 March 2008. (See Ex. 4 (#25) at 31). Even if this speech was a matter of public concern for
 3 discrimination in the work place, Plaintiff does not demonstrate that the protected speech was
 4 a substantial or motivating factor in the adverse employment action of transferring Plaintiff.
 5 Plaintiff's affidavit establishes that all of her transferring occurred prior to the filing of her
 6 charge of discrimination with NERC. Therefore, Plaintiff fails to demonstrate First Amendment
 7 retaliation with this alleged speech.

8 In her opposition to her motion for summary judgment, Plaintiff argues that her speech
 9 was “[e]xercising her right to medical care [based on] job related injuries.” (See Opp'n to Mot.
 10 for Summ. J. (#35) 8). In viewing Plaintiff's affidavit in the light most favorable to her, she
 11 asked for worker's compensation forms after her physician suggested that she had carpal
 12 tunnel syndrome. (See Hunt Aff. (#35-1) at 2). Based on the evidence before the Court this
 13 is the only thing that Plaintiff did to exercise her right to medical care for her job related injury.
 14 Therefore, her speech was not a matter of public concern because she only asked to fill out
 15 forms. As such, Plaintiff fails to state a First Amendment retaliation claim. Accordingly,
 16 Plaintiff fails to demonstrate that there is a genuine issue of material fact with respect to her
 17 First Amendment retaliation claim and the Court grants Defendant's motion for summary
 18 judgment as to claim two.

19 B. **Claim Three: Denial of Due Process**

20 The Nevada Supreme Court has held res judicata may apply to administrative
 21 proceedings. *Britton v. City of North Las Vegas*, 799 P.2d 568, 569 (Nev. 1990). Under the
 22 doctrine of collateral estoppel, or issue preclusion, a party may be barred from re-litigating an
 23 issue of fact or law that was previously decided in a different case. *Allen v. McCurry*, 449 U.S.
 24 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). In Nevada, collateral estoppel requires
 25 a showing of the following three elements:

26 (1) the issue decided in the prior litigation must be identical to the issue
 27 presented in the current action; (2) the initial ruling must have been on the merits
 and have become final; and (3) the party against whom the judgment is asserted
 must have been a party in privity with a party to the prior litigation.

28

1 *Kahn v. Morse & Mowbray*, 117 P.3d 227, 235 (Nev. 2005) (citations and internal quotations
2 omitted).

3 A federal court will accord “collateral estoppel to municipal administrative hearings that
4 have sufficient judicial safeguards.” *Jackson v. Gates*, 975 F.2d 648, 656 (9th Cir. 1992). To
5 determine whether sufficient safeguards apply, a court may consider the following factors:
6 “whether an administrative agency acted in a judicial capacity and resolved disputed issues
7 of fact properly before it which the parties had an adequate opportunity to litigate, and whether
8 the general collateral estoppel criteria apply.” *Id.* at 656 n.8.

9 Pursuant to Nevada Revised Statute § 284.376, “a [state] permanent classified
10 employee who has been transferred without the employee’s consent may request in writing
11 a hearing before the hearing officer of the Department to determine whether the transfer was
12 made for the purpose of harassing the employee.” Nev. Rev. Stat. § 284.376(1). The decision
13 of the hearing officer is binding on the parties. *Id.* § 284.376(3). The parties may “petition for
14 judicial review of the decision of the hearing officer.” Nev. Rev. Stat. § 284.390(8).

15 Here, Plaintiff appears to be claiming that Defendant violated her due process rights
16 for transferring her involuntarily. (See Compl. (#1) at 6). She appealed her transfer to the
17 Nevada State Personnel Commission Officer and argued that she had been transferred
18 without her consent, that she had been transferred four times, and that her job duties had
19 changed constantly. (See Ex. 3 (#25) at 25). The issue before the hearing officer was
20 whether Plaintiff had been involuntarily transferred, and, if so, whether such involuntary
21 transfer was done to harass Plaintiff. (See *id.* at 26). At the hearing, both Plaintiff and NDOT
22 were represented by counsel and both had the opportunity to present witnesses and exhibits.
23 (See *id.* at 25-26). After listening to the testimony and analyzing applicable administrative
24 codes, the hearing officer granted NDOT’s motion to dismiss. (See *id.* at 27-28). Nevada
25 Administrative Code 284.394(1)(A) and 284.612 provide that “a state employee may be
26 transferred for the convenience of the state if such transfer was within the same class . . . and
27 the transfer was within the same geographical location.” (See *id.* at 26). The hearing officer
28 found that the evidence indicated that Plaintiff’s job duties and position control number

1 remained the same after she transferred to the Landmark building in Carson City to
2 headquarters in Carson City and, thus, the transfer complied with the administrative code.
3 (See *id.* at 27-28).

4 In this case, the Court applies collateral estoppel to the issue of whether Defendant
5 violated Plaintiff's due process rights based on an allegedly involuntary transfer. First, the
6 administrative hearing had sufficient safeguards because the hearing was judicial and
7 adversarial in nature. Second, the due process issue below is the same due process issue
8 presented to this Court. Third, because Plaintiff did not appeal the hearing officer's decision,
9 the officer's decision that the transfer was not involuntary is final. Fourth, the administrative
10 hearing below involved the same parties. Accordingly, Plaintiff's due process claim is
11 precluded and the Court grants summary judgment on claim three. Moreover, Plaintiff fails
12 to make any arguments that collateral estoppel is inapplicable. Instead, Plaintiff only states
13 that summary judgment on her due process claim is "improper" because there "has been no
14 discovery." (See Opp'n to Mot. (#35) at 11).

15 **C. Claim Five: Intentional Infliction of Emotional Distress**

16 The elements for IIED are: "(1) extreme and outrageous conduct with either the
17 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having
18 suffered severe or extreme emotional distress and (3) actual or proximate causation." *Dillard*
19 *Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999). Defendant demonstrates that
20 there are no allegations in the record that establishes any of these elements. Plaintiff's
21 complaint only alleges that Defendant engaged in "extreme and outrageous conduct" that
22 "directly resulted in severe emotional distress . . . resulting in physical symptoms including
23 severe problems related to stress." (See Compl. (#1) at 7). In her response, Plaintiff states
24 that she will provide "objective confirmation of emotional distress" during discovery. (See
25 Opp'n to Mot. (#35) at 9). However, Plaintiff's affidavit fails to allege any type of extreme and
26 outrageous conduct and fails to describe any severe or extreme emotional distress.
27 Accordingly, Plaintiff fails to come forward with any specific facts showing that there is a
28 genuine issue for trial and the Court grants the motion for summary judgment on claim five.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendant's Motion for Summary Judgment (#25) is GRANTED in its entirety.

IT IS FURTHER ORDERED that Defendant's Motion to Grant Defendant's Motion for Summary Judgment (#30) is DENIED as moot.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

DATED: This 21st day of July, 2011.


R. Jones
United States District Judge